

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF SAN DIEGO

HALL OF JUSTICE

TENTATIVE RULINGS - March 08, 2018

EVENT DATE: 03/09/2018

EVENT TIME: 08:30:00 AM

DEPT.: C-74

JUDICIAL OFFICER: Ronald L. Styn

CASE NO.: 37-2017-00001377-CU-NP-CTL

CASE TITLE: JONES VS SHARP HEALTHCARE [E-FILE]

CASE CATEGORY: Civil - Unlimited

CASE TYPE: Non-PI/PD/WD tort - Other

EVENT TYPE: Motion Hearing (Civil)

CAUSAL DOCUMENT/DATE FILED:

Plaintiff's motion for class certification is denied.

Code of Civil Procedure section 382 authorizes class actions "when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court...." The party seeking certification has the burden to establish the existence of both an ascertainable class and a well-defined community of interest among class members. (*Lockheed, supra*, at p. 1104, 131 Cal.Rptr.2d 1, 63 P.3d 913, citing *Washington Mutual Bank v. Superior Court* (2001) 24 Cal.4th 906, 913, 103 Cal.Rptr.2d 320, 15 P.3d 1071 (*Washington Mutual*).) The "community of interest" requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class. (*Lockheed, supra*, at p. 1104, 131 Cal.Rptr.2d 1, 63 P.3d 913.) *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326.

Ascertainable Class

"A class is ascertainable if it identifies a group of unnamed plaintiffs by describing a set of common characteristics sufficient to allow a member of that group to identify himself or herself as having a right to recover based on the description." (*Bartold v. Glendale Federal Bank* (2000) 81 Cal.App.4th 816, 828, [97 Cal.Rptr.2d 226] (*Bartold*). [Citations omitted.] "Ascertainability is achieved 'by defining the class in terms of objective characteristics and common transactional facts making the ultimate identification of class members possible when that identification becomes necessary.'" (*Bomersheim v. Los Angeles Gay & Lesbian Center* (2010) 184 Cal.App.4th 1471, 1483, [109 Cal.Rptr.3d 832], quoting *Hicks v. Kaufman & Broad Home Corp.* (2001) 89 Cal.App.4th 908, 915, [107 Cal.Rptr.2d 761] (*Hicks*).) "Whether a class is ascertainable is determined by examining (1) the class definition, (2) the size of the class, and (3) the means available for identifying class members" at the remedial stage (*Reyes v. Board of Supervisors, supra*, 196 Cal.App.3d at pp. 1271, 1274–1275, 242 Cal.Rptr. 339 (*Reyes*).) *Aguirre v. Amscan Holdings, Inc.* (2015) 234 Cal.App.4th 1290, 1299–1300.

- Class Definition

Plaintiff seeks to certify the following class:

All persons who underwent a medical procedure in an operating room at the Women's Center at Sharp Grossmont Hospital between July 17, 2012, and June 30, 2013.

The court finds the class definition sufficient to allow members of the putative class to identify themselves as having a right to recover based on the description of the class.

The court is not persuaded by Sharp's arguments that the class definition is overbroad. Sharp's arguments are premised on first establishing that Plaintiff's claims (breach of fiduciary duty, common law invasion of privacy and invasion of privacy under the California Constitution) require proof of recording. Plaintiff provides authority to the contrary. *Hernandez v. Hillside, Inc.* (2009) 47 Cal.4th 272 evaluates both the common law and California Constitution-based privacy claims and concludes both require the same inquiry as to: "(1) the nature of any intrusion upon reasonable expectations of privacy, and (2) the offensiveness or seriousness of the intrusion, including any justification and other relevant interests." *Hernandez*, 47 Cal.4th at 288. *Hernandez* concludes that actual recording is not necessary to establish the first element – intrusion upon a reasonable expectation of privacy. Rather, the absence of actual recording is one factor to be considered in evaluating the second element of these causes of action – offensiveness/seriousness of the intrusion. *Hernandez*, 47 Cal.4th at 293. Because the inquiry as to the first element is based on an objective standard [*Shulman v. Group W Productions, Inc.* (1998) 18 Cal.4th 200, 231], the issue of whether placement of the recording device alone is an intrusion into the putative class members' reasonable expectations of privacy is an issue common to the class.

- Size of the Class

Plaintiff submits evidence that there were 1,806 patients who underwent surgical procedures in Sharp's Women's Center operating rooms during the class period. The court finds the size of the class sufficiently numerous.

- Means Available to Identify Class Members

Plaintiff submits evidence that Sharp's records can be used to identify all patients who underwent surgical procedures in Sharp's Women's Center during the class period. The court finds there are sufficient means available for identifying class members.

Community of Interest

The "community of interest" requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class. The certification question is "essentially a procedural one that does not ask whether an action is legally or factually meritorious." A trial court ruling on a certification motion determines "whether ... the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants." [Citations omitted.]

Sav-On, 34 Cal.4th at 326.

- Predominant common questions of law or fact

The "ultimate question" the element of predominance presents is whether "the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants." (*Collins v. Rocha* (1972) 7 Cal.3d 232, 238, 102 Cal.Rptr. 1, 497 P.2d 225; accord, *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326, 17 Cal.Rptr.3d 906, 96 P.3d 194.) The answer hinges on "whether the theory of recovery advanced by the proponents of certification is, as an analytical matter, likely to prove amenable to class treatment." (*Sav-On*, at p. 327, 17 Cal.Rptr.3d 906, 96 P.3d 194.) A court must examine the allegations of the complaint and supporting declarations (*ibid.*) and consider whether the legal and factual issues they present are such that their resolution in a single class proceeding would be both desirable and feasible. "As a general rule if the defendant's liability can be determined by facts common to all members of the class, a class will be certified even if the members must individually prove their damages." (*Hicks v. Kaufman & Broad Home Corp.* (2001) 89 Cal.App.4th

908, 916, 107 Cal.Rptr.2d 761; accord, *Knapp v. AT & T Wireless Services, Inc.* (2011) 195 Cal.App.4th 932, 941, 124 Cal.Rptr.3d 565.)
Brinker, 53 Cal.4th at 1021-1022.

The court addresses the damages issue only because the court finds this issue dispositive.

As to the breach of fiduciary duty cause of action the complaint alleges:

44. Plaintiff and the Class Members suffered harm, including but not limited to, suffering, anguish, fright, horror, nervousness, grief, anxiety, worry, shock, humiliation, embarrassment, shame, mortification, hurt feelings, disappointment, depression and feelings of powerlessness.

The complaint contains similar allegations as to the common law invasion of privacy cause of action [Cplt. ¶ 101] and California Constitution-based invasion of privacy cause of action [Cplt. ¶ 115].

While, generally, individualized proof of damages will not defeat certification [*Brinker*, 53 Cal.4th at 1022], "class certification is generally inappropriate when each member of the proposed class must individually establish emotional distress damages." *Bennett v. Regents of University of California* (2005) 133 Cal.App.4th 347, 358.

The evidence before the court is that not all surgical patients were recorded and that not all surgical patients were recorded in the same fashion or to the same extent. Plaintiff concedes that these issues are relevant to the damages analysis. The court finds the differences in the recordings of class members, combined with each individual class members' personal history, will necessarily impact the damages analysis in terms of both the nature and degree of emotional distress suffered. As *Bennett* explains, "there is no community of interest if class members are required to individually litigate numerous and substantial questions in order to establish their right to a recovery. (*Washington Mutual Bank v. Superior Court* (2001) 24 Cal.4th 906, 913, 103 Cal.Rptr.2d 320, 15 P.3d 1071.)" *Bennett*, 133 Cal.App.4th 347, 358.

The court is persuaded by the analysis in *D.C. by and through Garter v. County of San Diego* (S.D. Cal., Nov. 7, 2017, No. 15CV1868-MMA (NLS)) 2017 WL 5177028, at *15, *amended* (S.D. Cal., Feb. 1, 2018, No. 15CV1868-MMA (NLS)) 2018 WL 692252, a case involving the claims of minors who were subjected to physical examinations without the presence or consent of a parent or legal guardian. Applicable to the circumstances presented in this case, *D.C.* recognizes "proving injury to human dignity and emotional distress with respect to these claims will vary from person to person." *D.C.*, 2017 WL 5177028, at *15. *D.C.* explains,

though all children who underwent a medical examination at Polinsky without the appropriate consent or authorization may have suffered the same constitutional violations, the damages at stake likely vary greatly. For example, an infant class member, a five year old class member, and a twelve year old class member are unlikely to be entitled to the same compensation for their physical, mental, and emotional damages. Thus, representative testimony about what it was like to be subjected to a medical examination without the appropriate consent or authorization would not be probative as to the specific experiences of individual class members.

D.C., 2017 WL 5177028, at *16. Similarly, testimony from Plaintiff, who had her medical procedure recorded and who had her recording viewed by others will not be conclusive as to the specific experiences of class members who were not recorded or who were recorded in a different fashion. Evidence of Plaintiff's claimed emotional distress will not be probative of the emotional distress of other putative class members. In this circumstance the court finds individualized damages issues predominate over common questions.

In reply Plaintiff attempts to distinguish the authorities Sharp relies on but fails to persuasively argue that

common issues predominate on the issue of emotional distress damages. Plaintiff suggests questionnaires to document class members' economic damages, but fails to address how such questionnaires could be used with respect to class members' emotional distress claims. Plaintiff also fails to establish how the use of subclasses or bifurcation or "bellwether" trials could resolve the issue of individualized proof of emotional distress damages. Plaintiff fails to provide authority holding that emotional distress damages claims are appropriate for class treatment. The court is not persuaded by Plaintiff's reliance on *Trujillo v. City of Ontario* (C.D. Cal. 2005) 2005 U.S.Dist.LEXIS 50353 because there is no discussion of whether this case includes an analysis of class members' claims for emotional distress damages.

The court finds Plaintiff fails to meet her burden for class certification.

Addressing a related issue, Plaintiff's motion to strike the Declaration of James E. O'Brien is denied. Although the court denies Plaintiff's motion, the court does not consider the O'Brien declaration in ruling on this motion.

If this tentative ruling is confirmed, the Minute Order will be the final order of the court, and the parties shall not submit any further order on this motion.